

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Joseph Whiting, D-20,

Petitioner,

v.

United States of America,

Respondent.

Case No. 06-20465

Honorable Nancy G. Edmunds

**ORDER GRANTING PETITIONER'S MOTION FOR CERTIFICATE OF
APPEALABILITY [2729]**

This matter comes before the Court on Petitioner Joseph Whiting's motion for certificate of appealability under 28 U.S.C. § 2253. The Court granted in part and denied in part Petitioner's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 on August 27, 2015. In the event Petitioner files a timely notice of appeal and a request for a certificate of appealability pursuant to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b), section 2253 requires a habeas petitioner to seek a certificate of appealability from this Court.

The Court may issue a certificate of appealability if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

[T]he petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner] or that the questions are "adequate to deserve encouragement to proceed further."

Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983); *Hence v. Smith*, 49 F.Supp.2d 547, 549 (E.D. Mich. 1999).

Petitioner seeks certificate of appealability on two of the issues raised previously pursuant to 28 U.S.C. § 2255: ineffective assistance of counsel for failure to raise Petitioner's *Brady* claim on direct appeal and ineffective assistance of counsel for failure to raise Petitioner's *Apprendi* claim on direct appeal.

As to the first issue, the Court previously denied Petitioner's motion to vacate his sentence pursuant to his *Brady* claim. This Court finds that Petitioner has made a substantial showing with respect to this issue—that the issue is debatable among jurists of reason; that a court *could* resolve the issue in a different manner; or that the question is adequate to deserve encouragement to proceed further.

As to the second issue, in his amended § 2255 motion, Petitioner argued that the sentence being served was in violation of Due Process pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court granted Petitioner's motion based on his *Apprendi* claim and resentenced him on one count (Count 13). The Court finds that Petitioner has made a substantial showing of the denial of a constitutional right with respect to whether Petitioner's *Apprendi* claim calls for resentencing only on Count 13. With respect to this issue, Petitioner has shown that the issue is debatable among jurists of reason, that a court *could* resolve the issue in a different manner, or that the question is adequate to deserve encouragement to proceed further.

Being fully advised in the premises and having read the pleadings, the Court hereby GRANTS Petitioner's request for a certificate of appealability as to the two issues outlined above.

SO ORDERED.

S/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: October 7, 2015

I hereby certify that a copy of the foregoing document was served upon counsel of record on October 7, 2015, by electronic and/or ordinary mail.

S/Carol J. Bethel
Case Manager